Supreme Court U.S.
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No.

In the

Supreme Court of the United States

JOANNE CANNON,

Petitioner,

versus

DAVID BEAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE AND OTHERS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; CITY OF PHILADELPHIA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. The Petitioner Submitted Sufficient Evidence, Obtained From The Defendants, To Overcome The Standard For A Motion For Summary Judgement By Submitting Sufficient Direct Evidence To Overcome The Unsupported Allegation That A Purported Manhunt Had Prevented The Police In The Immediate Area From Assisting The Petitioner Who Was In Need Of Medical Transport/ Services, With Sufficient Direct Evidence That The Manhunt Was Over When Petitioner Presented With A Sudden Death Circumstance, And Said Granting Of The Motion For Summary Judgment Vacated The Petitioneræs Constitutional Right To A Jury Trial.

II. The Lower Courts Failed To Address City Of Philadelphia Police Department's "Directive #63 Hospital Cases, Dated March 08, 1996" Which The Department Issued Pursuant To The 1995 United States Department Of Transportatio's First Responder: National Standard Curriculum, And Which The City Of Philadelphia,With Deliberate Indifference, Circumvented By Failing To Train Police Officers As To Mandated Medical Transport Procedure And Basic Life Saving Skills And Said Failure To Train Caused In The Police Officers To Wilfull Disregard And/Or Be Indifferent To Petitioneræs Need For Medical Transport And Services, Thereby,Violating The Petitioneræs Substantive Due Process Right And Her Liberty Interest In Personal Security As Guaranteed By The Fourteenth Amendment To The Constitution To The United States.

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The decision of the United States Court of Appeals for the Third Circuit dated April 23, 2001, is set forth in the Appendix, p.1a. The opinion of the United States District Court for the Eastern District of Pennsylvania dated February 24, 2000 is set forth in the Appendix. p.8a

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The United States Court of Appeals for the Third Circuit issued its Decision in this case on April 23, 2001. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY, POLICE DIRECTIVE, AND COURSE MANDATE PROVISIONS INVOLVED IN THIS CASE

Constitutional Issues

1. Fourteenth Amendment, United States Constitution

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce Any law which shall abridge the privileges or immunities of citizens of the United States; nor Shall any State deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of

the laws.

2. Statutory Issues

42 U.S.C.A. §1983

> Every person who, under color of any statue, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen on the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action of law, suit in equity, or other proper proceeding for redress.

3. Philadelphia Police Department Directive 63
(material pertinent to Petitioner has been highlighted).

PHILADELPHIA POLICE DEPARTMENT

DIRECTIVE 63

SUBJECT: HOSPITAL CASES 3/8/96

I. POLICY

A. Police personnel will consider the assignment of a hospital case an emergency unless advised otherwise by a medically competent person. First aid will be rendered and the person transported to the nearest hospital. However, any person with a serious penetrating wound or a blunt-trauma to the body will be transported to the nearest accredits trauma center.

B. Police personnel assigned to radio patrol cars will, whenever possible, without detriment to the person, handle hospital cases to ensure availability of emergency patrol wagons for other assignments.

C. The Philadelphia Police Department will not dispatch police officers to the scene of hospital cases when Fire/Rescue responds except in the following circumstances:

1. When requested by Fire Communications.
2. Hospital cases arising from criminal acts, auto accidents or any other instances in which a police investigation/action is required.

II. PROCEDURE

A. Police personnel will transport:

1. Persons suffering from a serious penetrating wound, e.g. gunshot, stab wound, and similar injuries of the head; neck, chest, abdomen and groin to the nearest accredited trauma center. Transportation of such cases will not be delayed to await the arrival of Fire Department paramedics.

NOTE: Persons suffering from blunt trauma or a violent injury to the body (e.g. closed trauma to the head or chest as may result from a motor vehicle accident or a fall) should be transported to the nearest accredited trauma center by Fire Department paramedics because of the level of treatment that can be provided by the Fire Medics.

2. Police/Fire personnel as follows:
   a. On duty emergency - to appropriate treatment facility
   b. On duty non-emergency - to closest

Compensation Clinic

c. Off duty injury/illness – to a appropriate treatment facility

B. Police personnel will:

1. Exercise safety precautions as per Directive #93, "Communicable Disease Patients."
2. Permit family members or friends to accompany the person to the hospital.
3. Use handcuffs when transporting prisoners (unless otherwise directed by a supervisor).
4. Ride in the rear of an emergency patrol wagon with the person unless:
   a. the person is a prisoner.
   b. the injury/illness is not serious.
   c. the person is accompanied by family or friend.
5. Notify Police Radio of type of injury and hospital destination.
6. After the arrival at a trauma center with a person having a serious penetrating wound or a blunt trauma to the body, notify Police Radio operations desk and Operation Room Supervisor of district of occurrence by phone with the pertinent facts of the assignment.
   a. Notify Detective Division Supervisor if the injury is undetermined, suspicious or a crime has been committed.
7. Prepare a Complaint or Incident Report (75-48)on all hospital cases in Compliance with Directive 54.

C. Patrol Supervisor will:

1. Make the final determination for hospital cases requiring specialized treatment at

a hospital other than an accredited trauma center.

D. Police Radio will:

1. **Notify Fire Department paramedics to respond to serious injuries/illnesses.**
2. **Notify the receiving hospital of the person's condition and expected time of arrival.**
3. **Maintain a log on all trauma cases.**

E. Fire Department paramedics will:

1. **Respond to serious injuries/illnesses such as seizures, chest pains, strokes, overdoes, diabetic problems, unconsciousness, poisoning, broken bones or back injuries.**
2. **Assume full responsibility for the medical welfare of the person.**

III. MEDICAL TREATMENT OF PRISONER.

A. When a prisoner is taken to an emergency facility, the transporting officers will:

1. Prepare a separate 75-48 indicating the prisoner's name, the name of the hospital, a brief description of the injury and the physician's name. If the prisoner refuses medical treatment, request the physician sign the 75-48.
   a. Prior to removing a prisoner from the hospital, the transporting officers will contact the pertinent Detective Division/Unit Supervisor for instructions.
   b. The Operations Room Supervisor will ensure that the District Control Number for the original incident is used on this 75-48.

B. Distribution of the 75-48 for a prisoner receiving medical treatment.

Original	-	Reports Control and Review
Yellow Copy	-	District File
Pink Copy	-	To accompany the prisoner.

The PHILADELPHIA POLICE DEPARTMENT COURSE OUTLINE FOR EMERGENCY RESPONSE is as follows:

INTRODUCTION
PURPOSE OF THE COURSE

The purpose of the American Red Cross Emergency Response Course is to provide the recruit officer with the basic lifesaving skills required of police officer throughout the Commonwealth of Pennsylvania. These skills will assist the officer responding to an emergency by helping to sustain life, reduce pain, and minimize the consequences of injury of sudden illness until more advanced medical personnel arrive at the scene. The initial response of the police officer can often affect the medical outcome of the victim of sudden illness or injury.

The course content will prepare the recruit officer to make appropriate decisions about the care to provide in an emergency. The course provides the knowledge a police officer needs to act as a crucial link in the emergency medical service (EMS)system.

COURSE OBJECTIVES

At the conclusion of this course, the recruit officer will be able to:

- Explain how the EMS system works and how the police officer's role in the EMS system differs from the citizen responder's role.

- Describe steps to assure the well-being of the first responder.

- Identify guidelines to follow to ensure personal safety and the safety of others at the emergency scene.

- Explain what happens in the body if one or more body systems fail to function.

- Identify ways in which diseases are transmitted and describe body substance isolation techniques to prevent disease transmission.

- Describe when to move a victim in an emergency and the appropriate methods of doing so.

- Explain and demonstrate how to assess a victim's condition.

- Recognize life-threatening bleeding and demonstrate how to control it.

- Recognize the signs and symptoms of shock (hypoperfusion), and describe how to minimize its effects.

- Recognize the signs and symptoms of various soft tissue injuries, and demonstrate how to care for them.

- Recognize the signs and symptoms of medical and behavioral emergencies, including altered mental status, seizures, poisoning, heat and cold emergencies, and stroke and describe both general and specific care for medical and behavioral emergencies.

- Identify important aspects of Philadelphia Police Department Directives #63, Hospital Case, and #93, Communicable Disease as it pertains to the patrol officer.

- Recognize the signs of imminent childbirth and how to assist the mother and newborn through the birthing process.

INSTRUCTOR RESPONSIBILITIES

Your responsibilities as an authorized Red Cross Emergency Response Instructor are to:

- Be familiar with course materials and know how to use them effectively.

- Plan, coordinate and manage the course with the local Red Cross Chapter.

- Inform recruit officers of evaluation procedures and course completion requirements at the beginning of the course.

- Adapt your teaching approaches to the experience and ability of the recruit officer. Be aware of local protocols as they may differ from the course material.

- Be prepared to answer recruit officer's questions or know where to find the answers.

- Provide for the health and safety of recruits by always ensuring that:

    - Recruits are aware of universal precautions and guidelines concerning the transmission infections disease

    - Recruits know that they should consult with the instructor if they have concerns about their physical ability to perform skills.

- Identify recruit officers who are having difficulty mastering the course material, and develop effective strategies for raising their competence.

- Facilitate the administration of the written test's as per the policies of the Philadelphia Police Academy.

- Issue course completion cards.

- Submit completed course records and reports to the local Red Cross chapter.

- Identify the course being taught as an American Red Cross course and yourself as an American Red Cross instructor.

- Abide by the obligations in the Instructor Agreement and the Authorized Provider Agreement.

COURSE DESIGN

COURSE CONTENT

The content of this course is base on the U.S. Department of Transportation (DOT) 1995 First Responder: National Standard Curriculum. The course comprises information first responders need to provide appropriate initial care,regardless of the type of emergency. The course stresses the steps to follow in an emergency until more advanced medical personnel can arrive.

The course is designed to be flexible in delivery. The core material is keyed to meet the objectives of the DOT curriculum. Enrichment material has been added throughout the book to provide more -n-depth information and additional skills to meet broader training needs.

The lessons for core material are structured in one hour periods. Teaching the enrichment sections will require additional time to be added to the course.

STATEMENT OF THE CASE

Procedural History

On September 08, 1998, Joanne Cannon, (hereinafter "the Petitioner"), a resident of the Eastern District of Pennsylvania filed her complaint against David Beal, Individually and in His Official Capacity; John Doe and Others, Individually and in Their Official Capacity; and the City of Philadelphia (hereinafter referred to as "Beal" "the police department" and "the City of Philadelphia") wherein she alleged that City of Philadelphia, with

deliberate indifference, had failed to implement or establish a policy to train officers to provide "first responder type" medical assistance to a civilian who experiences a life threatening situation, in the presence of the officer, and that said failure to train permitted the police the willfully disregard the citizens request for assistance. The Petitioner sought a jury trial, damages in excess of $100,000.00 and reasonable attorney fees.

Petitioner served Interrogatories, Production of Documents and Subpoena for the Commandant of the Philadelphia Recruit Training Academy for deposition, together with documents relative to the First Reponder Act. Beal, the Police Department and the City of Philadelphia filed a Motion for Summary Judgment on August 17, 1999 alleging that the police could not assist Petitioner as there was an ongoing manhunt. Petitioner filed her response on October 25, 1999 denying that the manhunt had continued past the approximate time of 1:05 p.m. and supported this counterargument with copies of the Northwest Division and North Band Radio transmittals to the radio command center and to other police officers. The transcriptions contradicted the unsupported allegations of the defendants. The transcripts were provided by defense counsel.

On February 24, 2000 Summary Judgment was granted to defendants.

Petitioner filed her main Appeal Brief on November 13, 2000. Defendants filed their main Reply Brief on December 18, 2000. Petitioner's Reply Brief was filed January 4, 2001. The District Court's decision was affirmed on April 23, 2001.

Captain Arthur Grover, commanding officer of the

Philadelphia Police Academy's Recruit Training Program when he was deposed on June 14, 1999, under Subpoena with notice to bring documents relative to the First Responder Act and related Directives. Documentation was received subsequent to the close of discovery period.

Statement of the Facts

On September 11, 1996, at approximately 1:25 p.m., while Petitioner was freshening up to accompany defendants Beal, Sergeant and Officer John Doe's to the Detective Division to give a statement regarding the incident which had occurred earlier, she experienced shortness of breath and a sharp stabbing pain in the center of her chest. Petitioner slowly went down the stairs and on to the porch where Beal was standing and told him that she had chest pains, that she was a nurse, she thought she might be having a heart attack and that she should go to the hospital before going down town. Beal relayed this information to the Sergeant, who was about three feet away but still on Petitioner's property. The Sergeant's response was, "Get her name and number and we will get back to her." No attempt was made to get transport for Petitioner, who was now presenting symptoms of a heart attack. The aforesaid police remained on Petitioner's property.

Two separate neighbors attempted to intercede on Petitioner's behalf but got no response from the officers.

When the pain spread to Petitioner's back and was radiating to her left elbow, she made an informed decision that she would have to walk to the hospital, which was two blocks away, or she would die. A neighbor insisted on walking with her. The three police officers were still standing on Petitioner's property, with there backs turned.

During the walk up, literally since there was an incline to the street, with the neighbor supporting her around the waist, Petitioner had several syncopal experiences - loss of consciousness and collapse.

Petitioner did get to the hospital. Petitioner's diagnosis was acute anterolateral myocardial infarction; she was in a Sudden Death situation. She received thrombolytic (TPA) medication, a clot buster to prevent further damage to the heart. At one point she began to go into V Tach (ventricular tachycardia). The heart is going wild and the rate is extreme. V Tach is a percussor to **lethal** ventricular fibrillation. Petitioner has permanent heart damage and will be on heart medication for the rest of her life. Petitioner was without any evidence of coronary heart disease and the time of her injury and contiues so. The hospital's first record of her blood presssure is 13.50 M.T. (1:50 pm).

The statement, which Petitioner eventually gave, pertained to the armed man who, at approximately 1:00 p.m.,while having a running exchange of gun shots with the two officers attempting to apprehend him, forcebly and illegally gained entry into Petitioner's home. He aimed his gun at Petitioner's head and used expletive delated language. Petitioner escaped from her home and the gunman exited a few moments later while Petitioner was attempting to enter her neighbor's home for safety.

The gunman was apprehended by two other police officers at approximately 1:03 p.m.

The defendants, despite the transcription of contemporary police radio transmittals of the Northwest Division and North Band, and the clear import of what was happening, insist that the manhunt was still active at the

time of Petitioner's need. All that a police officer had to do was speak into his hand set and ask from EMS. See Directive 63,(*supra I*).

The Petitioner has filed a Petition for Certiorari to this Honorable Supreme Court based upon the issues and argument presented herein.

REASONS FOR GRANTING THE WRIT

I. THE PETITIONER SUBMITTED SUFFICIENT EVIDENCE, OBTAINED FROM THE DEFENDANTS, TO OVERCOME THE STANDARD FOR A MOTION FOR SUMMARY JUDGEMENT BY SUBMITTING SUFFICIENT DIRECT EVIDENCE TO OVERCOME THE UNSUPPORTED ALLEGATION THAT A PURPORTED MANHUNT HAD PREVENTED THE POLICE IN THE IMMEDIATE AREA FROM ASSISTING THE PETITIONER WHO WAS IN NEED OF MEDICAL TRANSPORT/ SERVICES, WITH SUFFICIENT DIRECT EVIDENCE THAT THE MANHUNT WAS OVER WHEN PETITIONER PRESENTED WITH A SUDDEN DEATH CIRCUMSTANCE, AND SAID GRANTING OF THE MOTION FOR SUMMARY JUDGMENT VACATED THE PETITIONER'S CONSTITUTIONAL RIGHT TO A JURY TRIAL.

A summary judgment motion is appropriate when there is no genuine issued of material fact *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242, 252, 106 s.cT. 2505 (1986). Petitioner disputed facts with particularity and cited to defendants own transcripts which were recorded contemporaneously with the action and which disproved defendants assertions.

A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nomoving party. *Anderson, supra.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.*

However, the Petitioner's case should have never been disposed of upon a summary judgment motion. The lower courts actions were an abuse of discretion as the District Court focused on the "shocks the conscience" theory in *County of Sacramento v. Lewis,* 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed. 2d 1-43 (1998) involving a police chase wherein this Honorable Court ". . . agreed with the Court of Appeals understanding of the claim to be one of deliberate indifference to Lewis's survival, which it treated as equivalent to one of reckless disregard for life." The "shocks the conscience" standard is for executive action.

Since the summary judgment was improperly granted, the Petitioner's constitutional right to a jury trial was violated. *See Page v. Work,* 290 F.2d 323,334 (9th Cir. 1961) *cert. denied,* 368 U.S. 873 (1961). The jury trial is not merely a procedural device, nor is it merely a procedural device; it is a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve.

A genuine issue of material fact exists. The defendants have ignored the true facts in their own documents. And the court has erred by missing the above quoted footnote 10.

The granting of this Petition for Certiorari will

permit a resolution of the disputed facts.

II. THE LOWER COURTS FAILED TO ADDRESS CITY OF PHILADELPHIA POLICE DEPARTMENT'S "DIRECTIVE #63 HOSPITAL CASES, DATED MARCH 08, 1996" WHICH THE DEPARTMENT ISSUED PURSUANT TO THE 1995 UNITED STATES DEPARTMENT OF TRANSPORTATION'S FIRST RESPONDER: NATIONAL STANDARD CURRICULUM, AND WHICH THE CITY OF PHILADELPHIA, WITH DELIBERATE INDIFFERENCE, CIRCUMVENTED BY FAILING TO TRAIN POLICE OFFICERS AS TO MANDATED MEDICAL TRANSPORT PROCEDURE AND BASIC LIFE SAVING SKILLS AND THAT SAID FAILURE TO TRAIN CAUSED IN THE POLICE OFFICERS TO WILFULLY DISREGARD AND/OR TO BE INDIFFERENT TO PETITIONER'S NEED FOR MEDICAL TRANSPORT AND MEDICAL SERVICES, THEREBY, VIOLATING THE PETITIONER'S SUBSTANTIVE DUE PROCESS RIGHT AND HER LIBERTY INTEREST IN PERSONAL SECURITY AS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Since the *Lewis* decision came down after the Third Circuit Court of Appeals had addressed the state-created danger theory in *Kneipp v. Tedder,* 95 F.3d 1199 (3rd Cir. 1996), the lower courts of the Eastern District of Pennsylvania have apparently interpeted the *Lewis* holding as establilshing the "shocks the conscience" standard to any claim raised in the context of civil rights violation of substantive due process issues under §1983 and the Fourteenth Amendment.

In the Cannon opinion the lower court so states, "Therefore, *Lewis* and *Miller, [Miller v. City of Philadelphia*, 174 F.3d 368 (3rd Cir. 1999)] hold that a state actor's behavior must shock the conscience to trigger §1983 liability. See Appendix **

However,in FN10 of *Lewis* this Honorable Court acknowledged the it has . . . also employed deliberate indifference as a standard of culpability sufficient to identify a dereliction as reflective of municipal policy and to sustain a claim of municipal liability for failure to train an employee who causes harm by unconstitutional conduct for which he would be individually liable. See *Canton v. Harris,* 489 U.S. 378, 388 -389, 109 S.Ct. 1197, 1204-1205, 103 L.Ed.2d 412 (1989) and there is no indication that this honorable court intended to discontinue the use of "deliberate indifference" standard for municipal liability for failure to train, otherwise it would have been accomplished in the body of the *Lewis* opinion.

The lower courts of the Eastern District of Pennsylvania have entered decisions which conflict with those of this court.

There is, also, a question as to what, if any, rights are conferred on the individual through the federally mandated first responder protocol?

In defendants Directive #63, 3/08/96, at E. a distinction is made as to serious injuries/illnesses such as seizures, chest pains, strokes, overdoes, diabetic problems, unconsciousness, poisining, broken bones or back injuries. Fire Department paramedics are to respond and assume full responsibility for the medical welfare of the person.

What is implicit in the above statement is that the Police Department is responsible for the medical welfare as long as the Police control the individual.

The Police Department has acknowledged in its First Responder Course Outline that Directive #63 was issued in compliance with the U.S. Department of Transportation's First Responder Act of 1995. Therefore, this court should interpret the extent to which the Firts Responder Act enlarges the civil rights of the citizen.

CONCLUSION

The Third Circuit and the Eastern District Court of Pennsylvania disregarded the fact that the defendants neither documented nor submitted testimony of any manner to substantiate their allegation that there was an ongoing manhunt at the time of Petitioner's need for medical services and transport and the genuine contest of the facts remains. The Third Circuit and the Eastern District Court of Pennsylvania appear to be entering decisions which conflict with those of this court.

The Court should grant *certiorari* to review this important matter, reverse the Third Circuit's and District Court's opinions, and order that the Petitioner had a constitutional right to a jury trial since it was proven that a genuine dispute on the facts exists between the parties, clarify the application of the "shocks the conscience" standard as to substantive due process rights pursuant to §1983, confirm that the "deliberat indifference" standard for municipal liability for failure to train continues, and if the court is so inclinded, determine whether the protocol established under the U.S. DEPARTMENT OF TRANSPORTATION First Resonder Act of 1995 confers constitutional or federal rights on those who are in need of medical services or transport.

Respectfully submitted,

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JOANNE CANNON, Appellant v. DAVID BEAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE AND OTHERS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; CITY OF PHILADELPHIA

No. 00-1208

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 2, 2001, Argued
April 23, 2001, Filed

MEMORANDUM OPINION
ROTH, Circuit Judge

Plaintiff Joanne Cannon brought this action pursuant to 42 U.S.C. § 1983 against the City of Philadelphia and several police officers, charging the defendants with violating her Fourteenth Amendment right to substantive due process by failing to help her to a hospital while she was suffering a heart attack. Cannon's complaint contained two principal claims: (i) that the named police officers created a danger resulting in harm to Cannon and (ii) that a policy or custom of the City of Philadelphia or the municipality's allegedly deficient training of its police officers caused an injury to Cannon of constitutional magnitude. On cross-motions for summary judgment, the District Court granted the defendants' motion and denied Cannon's. Because we find no error in the District Court's legal conclusions or its application thereof to the pleadings, we will affirm.

On summary judgment, a court must fully credit the evidence of the non-movant (here, with respect to the defendants' motion, Cannon) and draw all justifiable

inferences in the non-moving party's favor. Anderson v. Liberty Lobby. Inc., 477 U.s. 242, 255, 106 S. Ct. 2505 (1986). The applicable standards for deciding a summary judgment motion do not change when the parties file cross-motions for summary judgment. Applemans v. City of Philadelphia, 826 F.2d 214, 216 (3d Cir. 1987). Consequently, we present the critical facts of the case in the light most favorable to Cannon. After having heard several gunshots near her house, Cannon came face to face with the gunman in her own home. She then fled to her neighbor's house, where she twice called 911 but received no response. A few minutes later, upon learning from other neighbors of a multi-vehicle accident at a nearby intersection, Cannon walked to the site of the accident, asked a police officer whether the accident was connected with an armed man, received an affirmative response and brought the police back to her house to conduct a search. Following the search, Cannon experienced shortness of breath, chest pain and, later, pain radiating to her elbow. Despite several requests by Cannon and two neighbors, police officers on the scene declined to take Cannon to the hospital. One neighbor, Linda Maiden, offered to drive Cannon to the hospital, but was unable to do so because police vehicles were blocking the street. Consequently, Cannon was forced to walk, with Maiden's assistance, approximately a quarter mile to the hospital. It was ultimately determined that Cannon had suffered a heart attack which left her heart permanently damaged. As a result, she also experienced certain psychological changes diagnosed as posttraumatic stress disorder and will be required to take medication for the rest of her life.

We address Cannon's two main arguments in turn. First, she brings her claims against the police officers under the so-called 'state-created danger' doctrine. Generally, state

actors are under no affirmative obligation to protect citizens from injuries caused by others or themselves. DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195-96, 109 S. Ct. 998 (1989). One ofthe two exceptions to this rule is the state-created danger exception, which allows a plaintiff to recover under certain circumstances when a state actor creates a danger resulting in harm to an individual. Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 907 (3d Cir. 1997). We have enumerated a four-part test that a plaintiff must satisfy in order to prevail on a claim pursuant to the exception: (1) the harm ultimately caused must have been foreseeable and fairly direct; (ii) the state actor must have acted in willful disregard for the safety of the plaintiff; (iii) there must have existed some relationship between the state and the plaintiff; and (iv) the state actors must have used their authority to create an opportunity that otherwise would not have existed for the harm to occur. See Kneipp v. Tedder, 95 F.3d 1199 (3d Cir. 1996), quoting Mark v. Borough of Hatboro 51 F.3d 1137, 1152 (3d C ir. 1995). Additionally, because the state-created danger exception is rooted in substantive due process jurisprudence, the Supreme Court's decision in County of Sacramento v. Lewis, 523 U.S. 833, 118 S. Ct. 1708 (1998), applies to the instant case. Given the requirement of Lewis that the actions of the state actor must "shock the conscience' in order to trigger § 1983 liability, Lewis, 523 U.S. at 846-50, the District Court correctly concluded that if Cannon is to prevail on the second prong of the Kneipp analysis, she must prove that the defendant police officers' actions shock the conscience.

Applying the first factor of the Kneipp analysis, it is evident that the state-created danger in the instant case arose from the placement of a police barricade on Cannon's street. But for the fact that police cars were blocking the street, Maiden

would have been able to drive Cannon the two blocks to the hospital. We cannot characterize the asserted harm ultimately caused by the barricade the additional heart damage Cannon suffered as a result of receiving medical treatment later than otherwise possible and only after physical exertion — as a "foreseeable" or "fairly direct" consequence of the barricade. Kneipp, 95 F.3d at 1208 (citation omitted). Therefore, Cannon fails to satisfy the first prong of the Kneipp test.

Moreover, we find no error in the District Court's application of Kneipn. as modified by Lewis. As the District Court observed, the police officers in this case were acting in a situation so pressured as to inhibit their ability to act in a deliberate fashion: a large-scale manhunt for an armed suspect (entailing the additional activities of securing the crime scenes, locating and interviewing witnesses and collecting evidence) who had caused a serious multi-vehicle road accident, fled the police, shot an officer, and invaded at least one private residence. Evaluating the effect of such chaotic circumstances in light of the applicable caselaw cited by the District Court, particularly Lewis and Miller v. City of Philadelphia, 174 F.3d 38 (3d Cir. 1999), we cannot conclude that the police officers' failure immediately to transport Cannon to the hospital, while arguably negligent, rose to the requisite level of culpability under § 1983 and Kneipp: an action or omission "so ill-conceived or malicious that it 'shocks the conscience." Miller, 174 F.3d at 375, quoting Lewis, 11 8 5. Ct at 1717. Because Cannon fails to satisfy the first and second prongs of Kneipp, we need not address the remaining two.

Cannon's claims against the City of Philadelphia alleging that a municipal policy or custom or the city's purportedly deficient training of its police officers resulted in a violation

of her constitutional rights are without merit. Under § 1983, a local government cannot be held liable on the theory of respondeat superior for an injury inflicted solely by its employee or agent. Monell v. New York City Dept. of Soc. Serv., 436 U.S. 658, 694, 98 S. Ct. 2018 (1978). However, a local government body may be held liable if a state actor acts unconstitutionally pursuant to a government policy or custom. See id. at 658. Additionally, a municipality may be subject to § 1983 liability if it fails adequately to train its employees and such failure results in a constitutional violation. City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197 (1989).

Cannon simply fails to demonstrate either the existence of such a municipal policy or that the city failed to train its law enforcement personnel adequately. Her proffer of the statement of a single police captain concerning cardiopulmonary resuscitation training and emergency medical services practices cannot suffice to demonstrate the existence of a municipal policy. Moreover, although Canton's counsel urges that the defendants disregarded certain police department directives purportedly issued pursuant to a federal law or regulation, counsel did not cite such a law or regulation in her appellate brief; nor could she at oral argument. We, too, are unable to find one.fn1 Such a baseless contention is plainly insufficient to establish the existence of a city policy or a failure to train actiopable under § 1983.

Consequently, for the reasons set forth above and after a careful review of the parties' submissions and the record, we must agree with the District Court that the defendants are entitled to summary judgment. The order of the District Court is affirmed.

TO THE CLERK:
Please file the foregoing Memorandum Opinion.
By the Court,
/s/Jane R. Roth Circuit Judge

Footnote

Fn1Following argument, counsel for Cannon did submit to this Court a Philadelphia Police Department "Emergency Response" training course outline that names the U.S. Department of Transportation "1995 First Responder: National Standard Curriculum" as the source of the training course material. However, there is no demonstration in the record either that the First Responder curriculum provides the standard of conduct applicable to the defendants in this case, or that the City or the Police Department improperly taught such curriculum, if applicable.

JOANNE CANNON, Appellant v. DAVID BEAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE AND OTHERS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; CITY OF PHILADELPHIA

No. 00-1208

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

April 23, 2001, Filed

JUDGMENT

This case came on to be heard on the record before the United States District Court for the Eastern District of Pennsylvania and was argued on April 2, 2001. On consideration whereof,

IT IS ORDERED AND ADJUDGED by this Court that the judgment of the District Court dated February 24, 2000, be and the same is hereby affirmed.

Costs taxed against appellant. All of the above in accordance with the opinion of this Court.
Clerk

98-CV-4790

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOANNE CANNON, v. DAVID BEAL, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN DOE AND OTHERS, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES; CITY OF PHILADELPHIA

2/24/200

Now before me are cross-motions for summary judgment.fn1 For the reasons that follow, I will grant defendants motion and deny plaintiff's motion.

I. Backgroundfn2

Plaintiff brings claims against the City of Philadelphia and several police officers pursuant to 42 U.S.C. § 1983. She claims that, while she was having a heart attack, police officers failed to transport her to the hospital and blocked the road with parked police cars preventing someone else from driving her to the hospital.

On September 11,1996, plaintiff was painting in the basement of her home At approximately 1:00 p.m., she went outside to smoke a cigarette. While outside, she heard a gun shot coming from behind her house. She heard several more shots and then heard her dog barking inside her house. As she walked inside her house to see why the dog was barking, she met face-to-face with a man pointing a gun at her. She then ran out of her home to her neighbor's house. While in her neighbor's home, plaintiff and her neighbor

observed the gunman exiting plaintiff's house. Plaintiff called 911 from her neighbor's home. After there was no response to her first call, plaintiff called 911 again. A few minutes later, plaintiff observed several neighbors walking out of their homes. Plaintiff exited her neighbor's home and saw a group of people congregating at the end of the block. Her neighbors told her that there was a multi-vehicle accident at the corner of Henry and Roxborough Avenues and that many police officers were on the scene.

Plaintiff walked toward the accident and saw an overturned truck, a smashed car and at least five police vehicles. Traffic was blocked and there were people standing around watching. Plaintiff asked an officer if the accident had anything to do with an armed man. The officer responded, "yes," and told the plaintiff that there had been a shooting. Plaintiff told the officer that: "If you are looking for a man with a gun, he just came through my house."fn3 Pl. Dep. at 149. s Plaintiff, accompanied by police officers, then returned to her home. The officers searched her s home and plaintiff showed the officers where the gunman left her house and in which direction he fled.

An unknown officer told plaintiff to go in and secure her house, as she had to go to the police station and give a statement. Plaintiff responded that her children would be coming home from school soon and there would be no one to watch them when they arrived home. The officer told plaintiff that they would get someone to watch her children. When plaintiff went back in her home after turning off the lights and locking the windows and doors, she went upstairs to the bathroom to rinse her face. As she bent over the sink, she experienced shortness of breath and chest pains. Plaintiff came downstairs and walked outside where she saw Defendant Officer Beal and told him she could not go with

him to the police station. When Beal asked the plaintiff why she could not go to the police station, plaintiff responded "I''m having temble chest pain and shortness of breath." Pl. Dep. at 157-58. Beal told an unknown officer that plaintiff could not go with them because she was experiencing chest pain and shortness of breath. The unknown officer looked at plaintiff and said, "well, just get her name and number." Pl. Dep. at 158. Beal then asked for plaintiff's name and phone number and told her that they would get back to her.

Plaintiff's neighbor, Kris Bratten, came out of her house and asked plaintiff "what's the problem?" Pl. Dep. at 158. Plaintiff responded, "Kris, I am having terrible chest pain and shortness of breath." Pl. Dep. at 158. Plaintiff asserts that while the officers were in close proximity, she repeated several times that she was having terrible chest pains. Another neighbor, Linda Maiden, also asked plaintiff what was wrong. Maiden then asked how plaintiff was going to get to the hospital. Maiden asked Beal and other unknown officers if they could take plaintiff to the hospital. Plaintiff did not hear the officers' responses, but she heard Maiden ask the officers three times if they could take plaintiff to the hospital.fn4 Then, the plaintiff asked the officers if they could drive her to the hospital and explained again that she thought she was having a heart attack. The officers toLd the plaintiff that they would not take her to the hospital. Plaintiff claims that her condition worsened as she waited for transportation (from chest pains and shortness of breath to back pain and left arm pain radiating dawn to her elbow).fn5

Maiden then offered to drive plaintiff the two blocks to the hospital. Maiden was unable to take her there, however, because the street was blocked with police cars. Therefore, plaintiff walked, with the assistance of Maiden, to the

hospital. Maiden estimated that they walked a quarter mile from the plaintiff's home to the hospital. Plaintiff asserts that her condition worsened during the walk to the hospital. As a result of the heart attack, plaintiff sustained permanent heart damage and must take heart medication for the rest of her life. Additionally, plaintiff asserts that she has "changes of consciousness," mood and behavior and has been diagnosed with Posttraumatic Stress Disorder. Plaintiff claims that the officers' refusal to transport her to the hospital delayed her treatment and caused her condition to worsen.

II. Standard

Summary judgment is appropriate if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party moving for summary judgment must inform the district court of the basis for its motion, and identify those portions of record "which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett. 477 U.S. 317,323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). When the moving party does not bear the burden of persuasion at trial, as is the case here, its burden may be met by pointing out "an absence of evidence to support the nonmoving party's case." Id. at 325.

Once the moving party has filed a properly supported motion, the burden shifts to the nonmoving party to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The nonmoving party "may not rest upon the mere allegations or denials of the

[nonmoving] party's pleading," id., but must support its response with affidavits, depositions, answers to interrogatories, or admissions on file. Celotex, 477 U.S. at 324; Schoch v. First Fidelity Bancorporation. 912 F.2d 654,657 (3d Cir. 1990). The "evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." Anderson v. Liberty Lobby, Inc., 477 U.S. 242,255, 106 S.Ct. 2505,91 L.Ed.2d 202 (1986); see also Big Apple BMW. Inc. v. BMW of N. Am. Inc., 974 F.2d 1358, 1363 (3d Cir. 1992).

The applicable standards by which a court must decide a motion for summary judgment do not change when the parties file cross-motions for summary judgment See Applemans v. City of Philadelphia. 826 F.2d 214, 216 (3rd Cir. 1987). Each motion must be considered separately and each side must establish a lack of genuine issue of material fact and that it is entitled to judgment as a matter of law. Nolen v. Paul Revere Life Ins., 32 F.Supp.2d 211, 213 (E.D. Pa. 1998).

III. Discussion

Plaintiff brings two claims pursuant to 42 U.S.C. § 1983. By itself, § 1983 does not create any rights, rather § 1983 provides a remedy for violations of rights created by the Constitution or federal law. See, e.g., Morse v. Lower Merion School District. 132 F.3d 902, 906-07 (3rd Cir. 1997). In order to state a claim under § 1983, plaintiff must show that defendants, acting under color of state law, deprived her of a right secured by the Constitution or the laws of the United States. See See id. at 907. Plaintiff alleges that defendants violated her Fourteenth Amendment right to substantive due process by failing to help her or actively delaying her efforts to reach the hospital, when she

was having a heart attack. Plaintiff brings § 1983 claims: (A) against individual police officers alleging that the officers created a danger resulting in harm to the plaintiff and (B) against the City of Philadelphia alleging an unconstitutional custom or practice and a failure to train its officers.

A. The State-Created Danger Exception

In general, state actors have no affirmative obligation to protect citizens from injuries caused by others or themselves. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 495-96, 109 S.Ct. 998, 103 LEd.2d 249 (1989). There are two exceptions to this rule:

(1) the special relationship exception, which allows the plaintiff to recover when the state enters into a special relationship with a particular citizen and fails to protect the health and safety of the citizen to whom it owes an affirmative duty,fn6 and (2) the state-created danger exception, which allows the plaintiff to recover when, under certain circumstances, a state actor creates a danger that causes harm to an individual. See Morse v. Lower Merion School District. 132 F.3d 902, 907 (3rd Cir. 1997). Plaintiff brings her claims against Defendant Beal and other police officers pursuant to the state-created danger exception.

1. Third Circuit instruction on the state-created danger exception

In Kneipp v. Tedder, 95 F.3d I 199 (1996), the Third Circuit enumerated a four part test that a plaintiff must satisfy to prevail on a claim based upon a danger created by a state actor

(1) the harm ultimately caused was foreseeable and fairly direct;
(2) the state actor acted in willful disregard for the safety of the plaintiff;
(3) there existed some relationship between the state and the plaintiff; and
(4) the state actors used their authority to create an opportunity that otherwise would not have existed for the harm to occur.

See id at 1208 (citing Mark v. Borough of Hatboro, 51 F.3d 1137, 1152 (3rd Cir. 1995)). Applying this four part test, Kneipp held that there was a triable issue of fact as to whether the defendants (police officers) had violated Samantha Kneipp's Fourteenth Amendment right to substantive due process when, despite her severely intoxicated state, the defendants released her to return home alone after having earlier allowed her husband, Joseph Kneipp, to leave the scene. When the officers stopped the Kneipps they were only one-third of a block away from their home. id. at 1201. Before Samantha's detention by the police, for public drunkenness and disturbing the peace, Joseph was in the process of helping Samantha home because she was too intoxicated to walk on her own. After the officers detained the Kneipps, Joseph told one of the officers that he had a babysitter watching his son and that he needed to get home. The officer told Joseph that he could leave. Joseph testified that because Samantha was drunk, he assumed that the police officers were going to take her either to the hospital or to the police station. id at 1202. The Third Circuit reasoned that "[a] reasonable jury could believe that Joseph was correct in assuming that the police would take care of Samantha given his need to get home and care for their son." Id. at 1202 n. 7. In evaluating whether the officer acted with "willful disregard" in allowing

Samantha to walk home on her own, the court held that "the plaintiffs have adduced sufficient evidence to raise a material issue as to whether [the officer] acted in willful disregard for Samantha's safety... . by [the officer's] own testimony, he admitted that he knew Samantha was drunk." Id. at 1208-09. In conclusion, the Third Circuit held that "the evidence submitted was sufficient to raise a triable issue of fact as to whether the police officers affirmatively placed Samantha in a position of danger." Id. at 1211.

In Morse v. Lower Merion School District. 132 F3d 902 (3rd Cir. 1997), the Third Circuit again applied ihe state-created danger exception, this time upholding the dismissal of the plaintiff's claims. In Morse, a teacher was shot and killed in the Ardmore Child Care Center by a local resident with a history of mental illness. The gunman entered the school through an unlocked rear door. See id. at 904. The plaintiffs in Morse asserted that the School District had a written policy requiring that all side and back entrances be locked at all times and the School District was aware of, and facilitated, construction workers' access through the unlocked back door. See id. Applying the Kneipp test, the Third Circuit concluded that the plaintiff did not set forth a claim under § 1983. The Third Circuit's decision rested, in part, on the fact that the attack, by the mentally ill resident, was not foreseeable. at 908.

2. Recent guidelines on substantive due process by the United States Supreme Court and the Third Circuit

After the Third Circuit decided Kneipp and Morse. the United States Supreme Court in County of Sacramento v. Lewis. 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998), took the opportunity, in a case involving a police chase, to outline the procedure courts should use to arrive at

the proper standard of fault necessary to maintain a substantive due process claim against a state actor. Lewis holds that the standard of fault necessary to trigger § 1983 liability is directed by the context of the relevant state action. Because Lewis analyzes the overarching framework of substantive due process, its teaching applies to a state-created danger claim. Therefore, Lewis affects the application of Kneipp and Morse.

In Lewis, police officers attempted to pull over a motorcycle driven by Brian Willard, age 18, with Phillip Lewis, age 16, as a passenger. Instead of pulling over, Willard sped away and a high-speed police chase ensued, ending when the motorcycle tipped over. Lewis was pronounced dead on the scene. Lewis 118 S.Ct. at 1712. Lewis' parents and the representatives of his estate brought an action pursuant to § 1983 against Sacramento County, the Sacramento County Sheriff's Department, and a law enforcement officer alleging a deprivation of Lewis' right to substantive due process under the Fourteenth Amendment. The Supreme Court granted certorari to resolve a conflict among the Circuit courts over the proper standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case. See id. at 1713.

In delivering the opinion of the Court, Justice Souter observed that "[w]e have emphasized time and again that '[t]he touchstone of due process is protection of the individual against arbitrary action of government. . .". Id. at 1716 (quoting Wolff v. McDonnell. 418 U.S. 539,558,94 S.Ct. 2963,2976,41 LEd.2d 935 (1974) (citations omitted)). The çourt explained that "cases doing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary

in the constitutional sense,'. . .". Id (quoting Collins v. Harker Heights, 503 U.S. 115, 129, 112 S.Ct. 1061,1071, 117 L.Ed.2d 216 (1992)). Additionally, Justice Souter stated, "for half a century now we have spoken of the cognizable Level of executive abuse of power as that which shocks the conscience... . [and] [w]hile the measure of what is conscience-shocking is no calibrated yardstick, it does, as Judge Friendly put it, 'poin[t] the way." Id. at 1717 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied. 414 U.S. 1033, 94 S.Ct. 462,38 L.Ed.2d 324(1973)). Therefore, the Court held that in substantive due process cases the action of the state actor must "shock the conscience" to trigger § 1983 liability.fn7

The Court stated that "the constitutional concept of conscience-shocking duplicates no traditional category of-common-law fault, but-rather points clearly away from liability, or clearly toward it, only at the ends of the tort law's spectrum of culpability." Emphasizing that negligence alone was never enough, the Court observed that:

Whether the point of the conscience shocking is reached when injuries arc produced with culpability falling within the middle range, following from something more than negligence but less than intentional conduct, such as recklessness or gross negligence,... is a matter of closer calls. . . . some official acts in this range may be actionable under the Fourteenth Amendment...

Id at 1718 (internal quotations omitted). In determining whether an officer's actions shock the conscience in a substantive due process case, the Court required a determination of where on the spectrum of culpability the officer's actions fall.

The appropriate standard by which to consider if the state actor's behavior "shocks the conscience" must be evaluated in context of the relevant police activity at the time of the incident. In Lewis. the Court explained that "[r]ules of due process are not... . . subject to mechanical application...."Id. . .". Accordingly, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another, and our concern with preserving the constitutional proportions of substantive due process demands an exact analysis of circumstances before any abuse of power is condemned as conscience-shocking." Id. 1718-19. The Court compared the position of prison officials, who risk liability when they act with deliberate indifference to a prisoner's medical needs, with the position of police involved in a high-speed chase. The Court held that:

attention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other (even assuming that it makes sense to speak of indifference as deliberate in the case of sudden pursuit). As the very term "deliberate indifference" implies, the standard is sensibly employed only when actual deliberation is practical,... . and in the custodial situation of a prison, forethought about an inmate's welfare is not only feasible but obligatory...

Id at 1719. The Court further reasoned that "just as the description of the custodial prison situation shows how deliberate indifference can rise to a constitutionally shocking level, so too does it suggest why indifference may well not be enough for liability in.... . . different circumstances." Id. Therefore, the Court concluded that:

Like prison officials facing a riot, the police on an occasion calling for fast action have obligations that tend to tug against each other. Their duty is to restore and maintain lawful order, while non exacerbating disorder more than necessary to do their jobs. They are supposed to act decisively and to show restraint at the same moment, and their decisions have to be made "in haste, under pressure, and frequently without the luxury of a second chance."... A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

Id at 1720 (quotations omitted). The Court, therefore, held that "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." Id. Thus, "[r]egardless whether Smith's [the state actor's] behavior offended the reasonableness held up by tort law or the balance struck in law enforcement's own codes of sound practice, it does not shock the conscience, and petitioners are not called upon to answer for it under § 1983." Id. at 1721.
Therefore,differences in circumstances surrounding types of executive action affect plaintiff's ability to recover on a § 1983 substantive due process claim.

Recently, the Third Circuit in Miller v. City of Philadelphia, 174 F.3d 368 (3rd Cir. 1999), applied the analysis of Lewis in a substantive due process case that did not involve a police chase. In Miller, a mother, her children and ther attorney sued the City of Philadelphia, the Philadelphia Department of Human Services ("DHS"), a DHS social worker, the Children's Hospital of Philadelphia

("CHOP") and two CHOP security guards alleging violations of their procedural and substantive dueprocess rights under § 1983. See Miller, 174 F.3d at 370. The Miller plaintiffs' claims arose from an emergency ex parte child custody hearing after which two children were removed from their mother's custody.fn8 at 370-71. Following Lewis, the Miller court viewed the state actor's actions contextually. The Miller court, citing Lewis, explained that "[t]o generate liability, executive action must be so ill-conceived or malicious that it "shocks the conscience." at 375 (quoting Lewis, 118 S.Ct. at 1717). Miller also held that "[t]he exact degree of wrongfulness necessary to reach the 'conscience-shocking' level depends upon the circumstances of a particular case." Id. The court concluded that:

> We recognize that a social worker acting to separate parent and child does not usually act in the hyperpressurized environment of a prison riot or a high-speed chase. However, he or she rarely will have the luxury of proceeding in a deliberate fashion, as prison medical officials can. As a result, in order for liability to attach, a social worker need not have acted with the "purpose to cause harm," but the standard of culpability for substantive due process purposes must exceed both negligence and deliberate indifference, and reach a level of gross negligence or arbitrariness that indeed "shocks the conscience."

Id. at 375-76. Therefore, in Miller the Third Circuit applied the framework set forth in Lewis in evaluating the necessary level of fault for state actors given the context of the state actor's actions.

3. Impact of recent United States Supreme Court

decision (Lewis) and Third Circuit decision (Miller) on earlier Third Circuit articulation of state-created danger exception (Kneipp)

The Third Circuit in Fagan v.City of Vineland, 22 F.3d 1296 (3rd Cir. 1994) (en banc) (Fagan II) that, in a police pursuit case, involving an alleged violation of substantive due process rights, the actions of the state actor must shock theconscience to trigger liability. See id. at 1303. In Kneipp, however, the Third Circuit distinguished Fagan II. In Kneipp, the court recognized that Fagan II "declined to consider the applicability of the DeShaney line of cases which imposed a constitutional duty in limited situations, i.e., special relationship or custody cases, to police pursuit cases, as this issue was not raised by the parties or addressed by the district court." Kneipp, 95 F.3d at 1207. The Kneipp court also explained that "the plaintiffs in Fagan II did not advance the state danger theory as a basis for establishing a constitutional violation." Id. Therefore, the Kneipp court held that "the Fagan II shocks the conscience standard is limited to police pursuit-cases, and accordingly, we are not bound to follow that standard in the case before us." Id. at 1207—08.

In Lewis, the Supreme Court, held that "shocks the conscience" is the standard of fault triggering § 1983 liability in substantive due process cases involving abusive executive action.fn9 Although Lewis was a police pursuit case, the Court explained that the "shocks the conscience" standard applies to all substantive due process cases involving abusive executive action. In Miller, the Third Circuit recognized that Lewis requires a court, in all substantive due process cases, to determine lithe state actor's behavior shocks thà conscience. Therefore, Lewis and Miller hold that a state actor's behavior must shock the

conscience to trigger § 1983 liability. The state created danger exception, recognized in Kneipp, arises from substantive due process rights. Consequently, because state created danger is a subset of substantive due process Lewis and Miller require that, in a state-created danger case, the actions of the state actor must shock the conscience to trigger liability. In sum, the analysis of Lewis and Miller is significant because it affects the application of the Kneipp test.

The second Kneipp factor addresses the standard of fault that the plaintiff must prove to trigger liability in a state-created danger claim. This part of the Kneipp test required that the state actor acted with willful disregard for or deliberate indifference to plaintiff's safety. See Morse, 132 F.2d at 910. Lewis and Miller require that the actions of the state actor must shock the conscience to trigger § 1983 liability.fn10 Therefore, under Lewis and Miller, in order for the plaintiff to prevail on the second Kneipp prong, a plaintiff must prove that the state actor's behavior shocks the conscience."fn11 A determination of whether the actions of the state actor shock the conscience requires an evaluation of the context in which they acted. In other words, because Lewis and Miller hold that a determination of what shocks the conscience depends on the circumstances in which the incident occurred, identical actions of a state actor may be sufficient to set forth a state-created danger claim in one context, while it will not suffice in another context. fn12

Because I find that the officer's actions in this case do not shock the conscience, the plaintiff fails to satisfy the second prong of the Kneipp test.

4. Application of the second prong of the Kneipp test to

this case
As described above, I have determined that after the decisions of Lewis and Miller, the second Kneipp factor is a "shock the conscience" standard requiring an examination of the circumstances in which the officer acted.

Both Lewis and Miller involved pressurized situations in which the state actors were required to make quick decisions, whereas the facts of Kneipp did not involve similarly pressurized circumstances. In Lewis. the Court held that the officer's actions did not shock the conscience because the officer did not intend to harm the suspects as they fled on the motorcycle. In Miller, the Third Circuit, applying the shocks the conscience test, did not require that the social worker acted with a purpose to cause harm, but rather required that the social worker's actions reach a Level of gross negligence or arbitrariness. The Lewis case involved a high-speed police chase and the Miller case arose from the removal of children from a mother's custody due to suspected abuse. In both cases, the decisions of the state actors were made in pressurized situations without the luxury of proceeding in a deliberate fashion. Conversely, in Kneipp, there is no evidence that the officers were in a highly pressurized situation when they stopped the Kneipps for causing a disturbance. The officers Kneipp were able to proceed in a more deliberate fashion than the state actors in Lewis and Miller. Therefore, in evaluating whether the officer's actions shock the conscience, I must analyze whether the officers in this case were acting in a pressurized situation, inhibiting their ability to act in a deliberate fashion.

In this case, plaintiff asserts that the officers acted with willful disregard for her safety because they knew of her illness and did not try to obtain a substitute car or call 911.

In addition, plaintiff claims that because the officers allowed the street to remain blocked, they created a dangerous environment. Defendants contend that Officer Beal did not create a dangerous environment nor did he prevent the plaintiff from getting to the hospital.fn13 According to the Defendants, there was a large scale police manhunt underway to find the gunman who shot Sergeant Flemming and broke into plaintiff's home."fn14 Under such circumstances, defendants assert, it cannot be said that Officer Beal acted with "willful disregard for or deliberate indifference" to plaintiff's safety. Defendants claim that at worst, Officer Beal's conduct was negligent.

As in Lewis and Miller, the officers in this case did not have the luxury of proceeding in a deliberate fashion. Although the police activity in this case may not rise to the level of the "hyperpressurized" environment of a police chase, the situation did not unfold in a vacuum. The police - radio transmissions during the relevant time reveal that the events took place while officers were searching for alleged suspects and while officers were attempting to secure a crime scene. The officers' actions must be considered within the context of this surrounding police activity. As Lewis indicates, police officers frequently have obligations that tug in different directions. 118 S.Ct. at 1720. Here, the officers were attempting to apprehend a suspect and secure a crime scene and at the same time address the plaintiff's request for transportation to the hospital. The police officers were operating in the relative chaos of a recent shooting and accident and, therefore, were attempting to balance a multitude of competing concerns (eg. collecting evidence, interviewing witnesses, apprehending suspects). Regardless of whether the officers conduct "offended the reasonableness held up by tort law," the officers' conduct, in the context of a chaotic and dangerous crime scene, does

not shock the conscience. Lewis, 118 S.Ct. at 1721. Therefore, I find that while the officers may have been negligent, their conduct does not rise to a culpable level for § 1983 Liability and the plaintiff fails to satisfy the second part of the Kneipp test. Because the plaintiff fails to meet the second Kneipp factor, I will not address the remaining three prongs of the test.

B. Claims against the City of Philadelphia

Plaintiff's second § 1983 claim is against the City of Philadelphia (the "City"). Plaintiff claims that (1) a policy or custom of the City resulted in a violation of her constitutional rightsfn15 and (2) the City is liable for failing to adequately train its police officers.

The Supreme Court in Monell v. New York City Dept. of Social Serv., 436 U.S. 658,98 S.Ct. 2018, 56 L.Ed.2d 611, (1978), enunciated the rule for imposing liability on a municipality:

[A] local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Id. at 694. Therefore, a municipality cannot be held liable for the unconstitutional acts of its employees under a respondeat superior theory. Local government bodies, however, may be held liable if a state actor acts unconstitutionally pursuant to a government policy or custom. fn16 See id. at 658. The plaintiff must show that

the official policy or custom caused the deprivation of a constitutionally-protected right and the policy or custom must be the "moving force" behind the constitutional tort. See Board of the County Commissioners of Bryan County. Oklahoma v. Brown, 520 U.S. 397,404, 117 S.Ct. 1382, 137 L.Ed.2d 626 (1997).

Section 1983 liability may attach to a municipality if it failed to adequately train its employees and that failure caused the underlying constitutional violation. See City of Canton v. Harris, 489 U.S. 378, 109 S. Ct. 1197, 103 L.Ed.2d 412 (1989). The Court in Canton held that:

"[T]he inadequacy of police training may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of the persons with whom the police come into contact" Id. at 388. The Court also held the plaintiffs must provç that the "deficiency in training actually caused the police officers' indifference to [the individual's] medical needs." Id. at 391. Before addressing whether plaintiffs claims against the City meet the required standards, I must evaluate the effect on the claim directly against the municipality, of granting summary judgment in favor of the individual officers.

1. Effect of granting summary judgment in favor of the individual officers on plaintiff's municipal liability claim

In 1986, the Supreme Court held that a municipal-entity cannot be held liable under the Fourth Amendment if there is no underlying constitutional violation by the individual officer. City of Los Angeles v. Heller. 475 U.S. 796, 106 S.Ct. 1571,89 L.Ed.2d 806 (1986) (per curiam). In 1994, distinguishing Heller, the Third Circuit held that the granting of summary judgment in favor of the individual

officers does not preclude consideration of municipal liability. See Fagan v. City of Vineland, 22 F.3d 1283, 1292 (3rd Cir. 1994) (Fagan I). The Third Circuit reasoned that:

[I]n a substantive due process case arising out of a police pursuit, an underlying constitutional tort can still exist even if no individual police officer violated the Constitution. Unlike in Heller, the plaintiffs in this case brought separate, independent Constitutional claims against the pursuing officers and the City.

Id. at 1292. Similarly, in the case before me, the plaintiff has alleged substantive due process claims and has independently alleged constitutional claims against the City.fn17 Fagan I articulated that the claims against the individual officers and the City "are based on different theories and require proof of different actions and mental states." Id. For liability to attach to the individual officers, the officers' actions must shock the conscience. In this case, as already discussed in detail under section A, the officers' actions do not shock the conscience. Fagan I, takes the position that in a failure to train case, municipal liability attaches "(i]f its.[the city's] policymakers, acting with deliberate indifference, implemented a policy of inadequate training and thereby caused the officers. . . to deprive the plaintiffs of life or liberty." id. Therefore, Fagan I concludes that the standard ofculpability for municipal liability in a failure to train case is different than that for substantive due process claims against individual state actors.

Although Fagan I suggests that the appropriate standard for municipal liability, in a failure to train case, without individual liability, is simply "deliberate indifference," a

review of relevant cases indicates that the applicable standard is less clear. In Canton, the Supreme Court held that when a state actor commits the underlying constitutional tort, to hold the municipality liable in a failure to train-case, the municipality must be deliberate indifferent. See Canton. 489 U.S. at 388. In Canton. the Court "assume(d) that respondent's constitutional right to receive medical care was denied by the city employees whatever the nature of that right might be." Id at 389 n. 8. Therefore, the Canton court accepted that the state actor violated the plaintiff's constitutional rights before determining that the municipality had to be deliberately indifferent to trigger liability.

In Collins v. City of Harker Heights. 503 US. 115, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992), the SupremeCourt explained that "proper analysis requires us to separate two different issues when a § 1983 claim is asserted against a municipality: (1) whether plaintiff's harm was caused by a constitutional violation, and(2) if so, whether the city is responsible for that violation." Id at 120. Collins, therefore, held that for municipal liability to attach there must first be an underlying constitutional violation. See id.; see also Kneipp, 95 F.3d at 1212 n. 26.

In Collins, unlike in Cantos, the Court assumed that "the allegations in the complaint are sufficient to provide a substitute for the doctrine of respondeat superior as a basis for imposing liability on the city for the tortious conduct of its agents. . .". Collins, 503 U.S. at 124. As the Third Circuit has explained, the Collins Court "assumed that the municipality was responsible for the injury and asked whether the injury was of constitutional proportions. Thus, it reversed its focus from that in Citv of Canton." Mark v. Borough of Hatboro. 51 f.3d 1137, 1149 (3rd Cir. 1995). In explaining the denial of the plaintiff's claim, the Collins

Court stated that "[w]e. . . are not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." See id. at 128. Collins, therefore, requires that a municipality's actions must shock the conscience to create a constitutional violation.

The Third Circuit in Fagan I. decided after both Canton and Collins held that an underlying constitutional tort van exist even if no individual state actor violated the plaintiff's constitutional rights. Fagan I. therefore, indicates that the underlying constitutional violation may be committed by the municipality. Fagan I proposes that a municipality's failure to train, even without an individual state actor's liability, need only be deliberately indifferent to trigger liability. Therefore, reading Canton. Collins and Fagan I together, the applicable standard of fault in a municipal liability case, in which the individual state actors did not commit a constitutional tort, remains unclear.

The holding of Fagan I has been questioned by a later Third Circuit case. In Mark, the Third Circuit compared Collins with Fagan I and Fagan II, concluding that:

[T]he Fagan panel [Fagan I] opinion appeared to hold that a plaintiff can establish a constitutional violation predicate to a claim of municipal liability simply by demonstrating that the policymakers, acting with deliberate indifference, enacted an inadequate policy that caused an injury. It appears that, by focusing almost exclusively on the "deliberate indifference" prong of the Collins test, the panel opinion did not apply the first prong establishing an underlying constitutional violation.

Mark, 51 F.3d at 1153 n. 13. The Mark court acknowledged that "there is some inconsistency in our circuit as to the standard governing the underlying constitutional violation in policy, custom or practice cases." Id. The court, however, did not decide the appropriate level of fault in a municipal liability case, in the absence of individual state actor liability, because "[a]t any rate.. we believe that the defendants' actions and omissions not only fail to shock the conscience, but cannot be characterized as deliberately indifferent"fn19 Id. In Kneipp, however, the Third Circuit suggested that while the Mark court noted some inconsistency regarding the applicable standard of care for the underlying constitutional violation in policy or custom cases, the court did not indicate that there was an inconsistency in municipal liability cases regarding an alleged failure to train. Kneipp, 95 F.3d at 1212 n. 27. The Kneipp court explained that:

As we noted in Mark, some inconsistency exists in this circuit as to the standard of care to be applied to the underlying constitutional violation in policy, custom or practice cases. . . In Fagan II, we interpreted Collins to hold that the appropriate test in all substantive due process cases is whether the defendant's actions shock the conscience.... . . . In articulating the standard of care for municipal liability, however, we explained that the shocks the conscience standard applied to determine the liability of the pursuing police officers under section 1983, while a deliberate indifference standard applied to determine the municipality's liability. [citing Fagan I]... . . Although City of Canton predated our opinions in Fagan I & II and the Supreme Court's decision in Collins, we continue to recognize the application of the deliberate indifference standard to ascertain municipality liability as the constitutional standard in failure to train police officers

cases.
Id. Therefore, the Kneipp court suggests that while Fagan I does not clarify the appropriate standard for municipal liability in policy or custom cases, Fagan I appropriately held that "deliberate indifference" is the standard in failure to train cases.

In Simmons v. City of Philadelphia, 947 F.2d 1042 (3rd Cir. 1991), a Third Circuit case decided before Fagan I and Collins. now Chief Judge Becker, analyzed the appropriate level of fault necessary to prevail on a § 1983 claim against a municipality in the absence of an individual state actor's liability slightly differently. See id. at 1059. In Simmons, the mother of a decedent brought a § 1983 action against the City of Philadelphia and an individual officer after her son hung himself while in police custody. See id. at 1050. Simmons involved a claim that the City's policy or custom violated the decedent'sconstitutional rights, as well as an assertion that the City failed to adequately train police officers. The jury found that although the individual officer did not violate the decedent's constitutional rights, the municipality was liable under § 1983. id. id. at 1054. Judge Becker in finding no inconsistency in the jury's § 1983 verdicts, held that to establish municipal liability the plaintiff must both identify a particular official with policymaking authority in the areas in question and adduce "scienter-like" evidence with respect to the policymaker. id. at 1062-63. In a concurring opinion, then Chief Judge Sloviter, objected to the "scienter-like" requirement imposed by Judge Becker. id. at 1089-90. Judge Sloviter explained that "because of the common equation of 'scienter' with intentional action, I am concerned that Judge Becker's use of the term will be misread as limiting section 1983 cases to those where plaintiffs can show defendants knew of the constitutional deprivation and excluding those

cases where plaintiffs argue that defendants should have known of it." Id. at 1090. Judge Becker, seemed to require a higher level of culpability, a "scienter-like" requirement on the part of the policymakers, because Simmons was about the underlying constitutional violation committed by the City. Judge Sloviter, however, noted that Canton does not require actual knowledge or intentional conduct for a finding of deliberate indifference on the part of the municipality. Thus, Chief Judge Becker and Judge Sloviter were grappling with the necessary level of culpability for municipal liability in the absence of an individual state actor's liability. See also Karen M. M. Blum, Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the Canton Case from the Collins Case. 48 DEPAUI L. REv. 687, 702-03 (Spring 1999).

In sum, I am presented with various conflicting interpretations of the appropriate level of culpability applicable in a § 1983 case against a municipality in which the individual state actors are not liable. The confusion regarding how to evaluate a municipality's liability is buttressed by the seeming disagreement between present Chief Judge Becker and past Chief Judge Sloviter in Simmons and the Third Circuit's recognition in Makr, of Fagan I's failure to evaluate the applicable standard for the underlying constitutional violation.

The cases discussed above (Fagan I and II, Canton, Collins, Mark, Kneipp and Simmons) were all decided before the Supreme Court's decision in Lewis. Lewis may shed light on the appropriate standard of fault, applicable in a claim against a municipality in the absence of individual state actor's liability. Lewis explained that the "touchstone of due process is protection of the individual against arbitrary action of government..."'. . .". 118 S.Ct. at 1716 (quoting

Wolff v. McDonnell, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976,41 L.Ed.2d 935 (1974)). Lewis recognized that "the substantive component of the Due theDue Process Clause is violated by executive action only when it 'can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." at 1717 (quoting Collins, 112 S.Ct. at 1070.). In Lewis, the Court utilized a contextual analysis to evaluate whether an individual officer violated the decedent's constitutional rights. While Lewis did not address municipal liability, the instruction of Lewis arguably intimates that a contextual approach may be applied in evaluating a municipality's liability in the absence of an individual state actor's liability. In order for a municipality to commit the necessary underlying constitutional tort, an expansive reading of Lewis may suggest that the municipality's policy, custom or failure to train, viewed contextually, must shock the conscience. The conduct that satisfies this standard may differ depending on the circumstances. Therefore, while a state actor's behavior may not shock the conscience, the municipality's policy, custom or failure to train maybe conscience shocking.

Fortunately, in the case before me, I need not determine the appropriate standard of 'liability for a § 1983 claim against a municipality, in the absence of an individual state actor's liability. Even assuming that the plaintiff's constitutional rights were violated, the plaintiff fails to show that the municipality's policy, custom or failure to train caused her constitutional injury.'

Additionally, regardless of which standard applies plaintiff fails to demonstrate that the City's policies, customs, or failure to train are deliberately indifferent or shock the conscience. Therefore, even assuming the existence of an underlying constitutional violation and that the City need

only be deliberately indifferent to trigger municipal liability, I will grant the defendants' summary judgment motion.

2. Policy or custom

Plaintiff states that the City of Philadelphia ("City") has a "government custom on non-training in First Aid" and this custom was the "proximate cause of the injuries Ms. Cannon sustained." Pl. Resp. unnumbered at 15. Plaintiff asserts that: "[d]irections... . given as to how to deal with that catastrophic event [a heart attack], and directions that when breathing and pulmonary activity... . . stops to administer CPR and activate the EMS . . . [are] contrary to the first aid instructions in How to Recognize a Heart Attack." Pl. Resp. unnumbered at 9. The American Red Cross instructions 'regarding how to recognize a heart attack, attached to the plaintiff's brief state in part that: "[I]t is essential that the nearest person activate EMS systems and be prepared to perform CPR if necessary. If you are with someone who is having the signals of a heart attack and if they last longer than a few minutes, act at once." Pl. Ex. K. Captain Grover, the commanding officer of the Philadelpia Police Academy's Recruit Training Unit, testified that: "We teach signs and symptoms of recognition of heart attack, we give direction as to how to deal with the catastrophic event, and we give direction when breathing and pulmonary activity stops to administer CPR and activate the EMS, which means call fire rescue." Grover Dep. at 6-7, 13-14. Plaintiff suggests that Captain Grover's statement above indicates that the officers were not trained to activate EMS until after someone's breathing and pulmonary activity stopped. Therefore, plaintiff suggests that Captain Grover's statement indicates that the City gives inappropriate information to officers regarding suitable conduct when confronted with a potential heart attack victim.

Although this argument is not developed by the plaintiff, viewing plaintiff's claims in the most favorable light, plaintiff may be asserting that Captain Grover's "edicts or acts may fairly be said to represent official policy" and therefore, his failure to adequately instruct the officers in first aid is an unconstitutional custom or practice of the City. Plaintiff presents no evidence that Captain Grover's statement, made during a deposition, is the policy orcustom of the City. Even if Captain Grover's statement may be deemed the policy of the City, there is no evidence that the statement of Captain Grover caused the purported constitutional injury. There is nothing in the record to suggest that the officers failed to transport the plaintiff to the hospital because they were waiting for the plaintiff to stop breathing before calling EMS. Plaintiff, therefore, also failed to satisfy the causation element of this Monell claim. Consequently, I will grant summary judgment on PlaintifFs claim that the City's policies or customs violated her constitutional rights.

3. Failure to train

In Reitz v. County of Bucks. 125 F. 3d 139 (3rd Cir. 1997), the Third Circuit noted that "[e]stablishing municipal liability on a failure to train claim under § 1983 is difficult" Id. at
145. In assessing municipal liability for failure to train, the focus is on the adequacy of the training program in relation to the tasks that the particular officers must perform. See Canton, 498 U.S. at 390. The fact that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability to the city, since the officer's shortcomings may have resulted from factors other than a faulty training program. See id. at 390-91. Evidence that an injury or accident could have been avoided if an officer had better

ormore training, sufficient to equip him to avoid the particular injury-causing conduct will also not establish liability since even adequately trained officers may make mistakes. id. at 391. Furthermore, for liability to attach, the identified deficiency in a city's training program must be closely related to the ultimate injury and thus the plaintiff must prove that the deficiency in training actually caused his other injury.

Plaintiff refers to two police directives (police policies) when arguing that the City is liable. fn20 First, plaintiff claims that officers, in this case, failed to follow police directive # 63. This directive states in part that: "Fire Department paramedics will: 1. Respond to serious injuries/illness such as seizures, thest pains, strokes, overdoses, diabetic problems, unconsciousness, poisoning, broken bones or back injuries. 2. Assume full responsibility for the medical welfare of the person." Pl. Resp. Ex. E. Plaintiff claims that directive #63 implies that until the fire department paramedics arrive, the City or its police department is responsible for the medical welfare of the injured person. Plaintiff also claims that directive #63 requires that when transporting a crime victim who has yet to make a statement, an officer should accompany the victim to the hospital. Second, plaintiff alleges that defendants did not adhere to directive # 45 as to the use of police vehicles in emergency situations. Directive #45 states in relevant part that: "E. A driver engaged in vehicle operations may:.. 4. Disregard the laws governing the parking of vehicles under ordinary circumstances, except that a police vehicle WILL NOT block access to a fire hydrant at a fire scene, or in any way obstruct the passage of fire apparatus....VII. PARKING... B. Police vehicles will be parked in a legal manner unless an emergency exists." Pl. Resp. Ex. F.

In an attempt to establish municipaL liability, plaintiff also states that, while the "course objective" for emergency response is adequate, Officer Beal's First Aid is "woeful" and Captain Grover's belief that 911 should be contacted only after the death of the victim is "shocking."fn21 Plaintiff states: "The fact that almost three years have elapsed since Ms. Cannon [sic] injury and Captain Grover has thinking [sic] similar to Officer Beal, lead to the inevitable conclusion that there is deliberate indifference on the part of the City of Philadelphia as to First Aid competency of its' police force, at least as to a civilian." Pl. Resp. unnumbered at 15.

Additionally, attached to plaintiff's brief is an expert report from R. Paul McCauley, Ph.D., BCFE. In preparation for drafting his report, Dr. McCauley reviewed various relevant documents and statements pertaining to this case. Dr. McCauley concluded that "[flailing to render medical assistance or failing to call for emergency medical services, when informed of such a medical-emergency by any citizen, and especially a crime victim, falls below accepted police practices." P1. Resp. Expert Report. In a supplemental report, Dr. McCauley opined that

"[w]hen Officer Beal became aware of Ms. Cannon's [plaintiff's] chest pains... . . he should have radioed for Fire/Rescue as outlined in Directive 63.II.E.l and 2. 'Fire Department paramedics will respond to serious injuries/illness such as seizures, chest pains.... . . [and] Assume full responsibility for the medical welfare of the person." Id. Dr. McCauley stated that

The use and parking of police vehicles in an emergency situation... . . . is complex. . . . It is essential that supervisory/command Officers monitor emergency vehicle

responses and placement to ensure ingress and egress by fire trucks, EMS, and other essential emergency vehicles. . . . With the shooting suspect in custody and in the hospital by 1:09 p.m., the supervisor/ command Officer should have protected the scene and down-graded the general incident area consistent with Dir. 46.III.F.1.

Id. Dr. McCauley concluded that "[t]he failure of Off. Beal and the PPD [Philadelphia Police Department] to respond to the emergency medical needs of Ms. Cannon were contrary to PPD Directives and fell below accepted police practices and were causes of the harm she suffered."

Defendants assert that plaintiff cannot establish that the City's training, discipline or supervision of police officers is so deficient and widespread that it constitutes "deliberate indifference" to the Fourteenth Amendment rights of its citizens. Captain Grover testified in his deposition that there are established protocols foc (1) communicating over police radio; (2) creating a command structure when police officers from multiple districts respond to an incident;(3) assuring that at the beginning of each shift, officer's handheld radios are equipped with new battery packs; (4) transportation of injured or sick people to the hospital; and (5) officer training regarding first aid, CPR, and recognition of the signs and symptoms of serious maladies. Def. Mot. Ex. C. at 8, 12-14. Therefore, defendants conclude that plaintiffs claim of municipal liability must be dismissed.

When arguing that the City is liable, plaintiff makes conclusory allegations about the defendants' non-compliance with existing police directives. Plaintiff fails to set forth the necessary evidence to sustain her claim that the officers' reactions to her illness resulted from a failure of the City to adequately train these officers. First and foremost, while the

plaintiff contends that the officers failed to follow certain police directives she offers no evidence that the City failed to adequately train the officers. As Canton instructs, the fact that a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability to the City, since the officer's shortcomings may have resulted from factors other than a faulty training program. See 4S9 U.S. at 390-91. Secondly, plaintiff presents no evidence that a training deficiency actually caused her injuries, a necessary requirement to trigger liability. See id. at 391. Third, plaintiff did not identify the specific training the City should have offered which would have prevented the deprivation of plaintiff's constitutional rigbts nor did she establish that such training was not provided. See Reitz, 125 F.3d at 145. Lastly, and perhaps most fundamentally, plaintiff failed to demonstrate that the training program was inadequate. See Canton. 489 U.s. at 390. There is no evidence that the City's existing training program would obviously lead to constitutional violations. See id. Accordingly, I will grant the defendants' motion for summary judgment as to this count.

ORDER

AND NOW, this 24 day of February, 2000, upon consideration of defendants' motion for summary judgment, plaintiff's response, plaintiff's cross motion for summary judgment, the pleadings, and the evidence submitted there with, I ORDER that:

(1) Defendants' motion (docket entry #7) is GRANTED; and

(2) Plaintiff's motion (docket entry #9) is DENIED.

Anita B. Brady, J.

Footnotes

Fn1Plaintiff refers to her motion as a countermotion. I will interpret plaintiff's motion as a cross-motion for summary judgment

fn2 The following facts are presented in the light most favorable to the plaintiff because I will deny plaintiff's motion for summary judgment, even viewing the facts in this manner.

fn3Defendants claim that the gunman who broke into plaintiff's home was being chased by the police. During the chase, the gunman was involved in a-car accident that resulted in a truck overturning. The gunman fled the scene with the police in pursuit. There was an exchange of gunfire and Police Sergeant Flemming was shot.

Plaintiff asserts that both Sergeant Flemming and the gunman had been transported to the hospital by 1:09 p.m. Pl. Resp. Exs. P. and Q. Plaintiff also claims that the police car congestion on the street was part of an "unannounced drill." Plaintiff, however, does not expand on what s she means by an "unannounced drill."

Fn4According to plaintiff, the first time Maiden asked for help she was told that the officers needed authorization from a supervisor before they could transport the plaintiff to the hospital. The second time Maiden requested assistance she was ignored, and the third time she was told no cars were available to take the plaintiff to the hospital. Plaintiff also claims that Maiden "begged" the officers to help plaintiff get to the hospital Pl. Resp. at 5.

Fn5Plaintiff asserts that an injured dog (the dog had been shot) was driven to the veterinarian by an officer, while no one could take her to the hospital.

fn6 A special relationship exists when "the State by the affirmative exercise of its power so retrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs — e.g., food, clothing, shelter, medical care, and reasonable safety — it transgresses the substantive limits on state action set by... . the Due Process Clause." DeShaney, 489 U.S. at 200. For example, the "special relationship" exception may apply to an incarcerated prisoner or an involuntarily committed mental patient.

Fn7 While holding that "shocks the conscience" is the appropriate level of fault, the Court also recognized that deliberate indifferent conduct is enough to satisfy the fault requirement for due process claims based on the medical needs of a pre-trial detainee. The Court explained that [d]eliberate indifference that shocks in one environment may not be so patently egregious in another. . .". Lewis. 118 S.Ct. at 1718. Therefore, theCourt suggested that in certain circumstances deliberate indifference may be enough to shock the conscience.

fn8 Miller's children were eventually returned to her custody. See Miller, 174 F.3d at 371.

Fn9 In reaching this conclusion, the Lewis Court cited Fagan II in a list of divergent Circuit court cases necessitating the Supreme Court determination of the standard of culpability on the part of law enforcement officers for violating substantive due process in a pursuit cases See Lewis, 118 S.Ct. at 1713.

fn10Lewis indicates that under certain circumstances and conditions, deliberate indifference may satisfy the "shocks the conscience" standard. See 118 S.Ct. at 1718.

Fn11 Similarly, in applying the state-created danger test, Judge Shapiro in Schieber v. City of Philadelphia, No. 98-5648, 1999 WL 482310 (E.D.Pa. July 9, 1999), citing Lewis and Miller. held that "[w]hen addressing whether the officers acted with wilful disregard, the appropriate test to apply to the actions of the officers is whether their conduct 'shocks the conscience.'" Id. at *4 (citing Lewis. 118 S.Ct. at 1720 and Miller. 174 F.3d 368) (granting motion to dismiss in part where plaintiffs brought suit against the city as a result of police officers' alleged failure to adequately investigate neighbors heard woman screaming in her apartment). Judge Shapiro concluded that a court "must consider how much time the governmental actor had to contemplate the appropriate course of conduct. . . . [and] [t]he underlying government action must be considered, not the outcome." Id. at *5 (citations omitted).

fn12 As Lewis recognized, "[d]eliberate indifference that shocks in one environment may not be so patently egregious in another..." .". 118 S.Ct. at 1718.

fn13 Defendants do not raise, and therefore I will not address, the defense of qualified

fn14 Plaintiff asserts that the police car congestion on the street was the result of an "unannounced-drill." Plaintiff however, does not expand on what she means by an "unannounced drill" and presents no evidence on this. Pl. Resp. at 11. Plaintiff also suggests that the gunman was in police custody at the time the officers refused to transport

her to the hospital. Pl. Resp. at 10-11. After reviewing the police officers radio transmissions during the date and time of this incident I find that there was ongoing police activity including searching for other possible suspects and securing the crime scene in or around the time thtat plaintiff requested the officers transport her to the hospital. Pt. Resp., Exs. P and Q. For example, when the officers went to plaintiff's home, after she informed them that a gunman had been inside her house, the officers were still looking for a suspect.

fn15While plaintiffs municipal liability claim on this issue is ambiguous, in an abundance of caution, I will assume that plaintiff brings a claim based on an unconstitutional policy or custom.

fn16"A policy is made when "a 'decisionmaker possess[ing] final authority to establish municipal policy with respect to the action' issues an official proclamation, policy, or edict." Beck v. City of Pittsburgh. 89 F.3d 966, 971 (3rd Cir. 1996) (quoting Andrews v. City of Philadelphia, 895 F.2d 1469, 1480 (3rd Cir. 1990) (citations omitted)). A custom is defined as -. "such practices of state officials so permanent and well-settled as to virtually constitute law." Id. Custom may also be established "by evidence of knowledge and acquiescence." Id.

fn17 Based upon jurisprudence of the Third Circuit to date, I find tha: there is no reason to limit the applicability of Fagan I to police pursuit cases.

Fn18In Fagan II, the Third Circuit, confirmed that "[i]n Collins, which represents the Supreme Court's most recent pronouncement on substantive due process as applied in a civil damage action, the Court unanimously reaffirmed the

viability of the 'shocks the conscience' standard." Fagan 11.22 F. 3d at 1304.

fn19Additionally, a recent law review article notes that "the Third Circuit Court of Appeals has most consistently embraced the approach to municipal liability that ignores the important distinction between the Supreme Court's statutory interpretation of § 1983 in Canton and its constitutional analysis of substantive due process in Collins." Karen M. Blum, Municipal Liability: Derivative or Direct? Statutory or Constitutional? Distinguishing the Canton Case from the Collins Case. 48 DEPAUL L. Rev. 687, 702-03 (Spring 1999). Professor Blum explains that "[t]he Third Circuit's mistake in Fagan [Fagan I] is in treating proof of statutory [§ 1983] responsibility under Canton's deliberate indifference standard as proof of constitutional [substantive due process] liability under Collins." Id. at 705.

fn20Although plaintiff does not clarify her argument, I interpret her argument as follows:

because the officers failed to comply with police directives, they were not property trained.

fn21 assume plaintiff is referring to Captain Grover's statement that: "We teach [to the police-officers] signs and symptoms of recognition of heart attack, we give direction as to how to deal with the catastrophic event, and we give direction when breathing and pulmonary activity stops to administer CPR and activate EMS, which means call fire rescue." Grover Dep. at 13-14.